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# Circumventing Sullivan: An Argument Against Awarding Punitive Damages for Newsgathering Torts

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# Circumventing *Sullivan*: An Argument Against Awarding Punitive Damages for Newsgathering Torts

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> "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."[1]

The United States Supreme Court has recognized that "seeking out the news" warrants First Amendment protection.[2] However, the Court has never defined what First Amendment protections apply to newsgathering or how broadly these protections extend. In cases in which the press has sought protection for newsgathering, the United States Supreme Court has instead rested on the proposition that generally applicable laws do not violate the First Amendment simply because they burden the press's ability to seek out and gather the news.[3] This conflict recently gained national attention in the case of *Food Lion, Inc. v. Capital Cities/ABC, Inc.*[4]

## I. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*

In 1992, Lynne Litt and Susan Barnett, two producers of ABC's PrimeTime Live news program, used false identities and falsified employment applications in order to obtain employment at separate Food Lion grocery stores.[5] Litt and Barnett sought information for a news story on reputed unsanitary practices by

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1. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

2. *Id.* at 681 ("We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."); *see also* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (offering protection for "routine newspaper reporting techniques").

3. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663 (1991); *Branzburg*, 408 U.S. 665.

4. 887 F. Supp. 811 (M.D.N.C. 1995).

5. *See id.* at 816.

Food Lion.[6] Both were subsequently employed;[7] Litt as a meat wrapper[8] and Barnett as a deli clerk.[9]

During their employment, Litt and Barnett used hidden cameras and audio recording devices to obtain information for the news story that aired November 5, 1992, on the ABC network.[10] The story included revelations by former Food Lion employees and five to six minutes of hidden camera footage obtained by Litt and Barnette.[11] The former Food Lion employees revealed practices of grinding rotten pork into sausage,[12] climbing into dumpsters to retrieve food,[13] and rinsing ham and spoiled fish with bleach in order to "take the smell out."[14] Hidden camera footage showed one Food Lion manager making what he called "conversions" by cutting spoiled edges off of old pork chops and subsequently repackaging and relabeling them as fresh.[15] Other employees were shown incorporating out-of-date ground beef with fresh ground beef, repackaging old fish and relabeling it as fresh, and transforming Country Pride brand chicken that had past its expiration date into a new "gourmet" selection by placing barbecue sauce on it and selling it as fresh food.[16]

The Food Lion story reached a larger viewing audience than any prior PrimeTime Live program.[17] Food Lion suffered dramat-

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6. *See id.* at 814-16.
7. *See id.*
8. *See id.* at 816.
9. *See Food Lion,* 887 F. Supp. at 816.
10. *See id.*
11. *See id.*
12. *See Hidden Cameras, Hard Choices: ABC PrimeTime Live* (ABC television broadcast, Apr. 12, 1997) (hereinafter *PrimeTime Live*) ("They take that pork that's already starting to get a slime to it . . . and they take and put that in the grinder with sausage mixture and they put it back out for anywhere from 7 to 10 days as fresh homemade sausage—and it's rotten.").
13. *See id.* (Employee: "I've seen them in the dumpster, not just leaning over into . . . climb in it . . . I mean be up in it." Diane Sawyer: "And taking out what kinds of things?" Employee: "Just take a head of cauliflower for instance, to where its just got black little spots over the top of it and they'd bring it back in . . . they'd want you to take a like a brillo pad-type-thing and scrub to—get the little black stuff off, and stick it back in the tray and reduce it, and try to get something for it.").
14. *Id.*
15. *Id.* (showing Food Lion Market Manager display pork chops and say, "These are conversions—they look just as good as fresh.").
16. *See id.*
17. *See PrimeTime Live, supra* note 12.

ic losses as a result of the broadcast.[18] Immediately after the broadcast, Food Lion's retail sales dropped, and within days, the value of Food Lion's stock fell significantly.[19] By 1993, Food Lion's annual profits had plummeted from $178 million to $3.9 million.[20]

Food Lion sued ABC.[21] In a forty-seven page complaint, Food Lion alleged claims of intentional misrepresentation, deceit, fraud, trespass, civil conspiracy, violations of federal wiretapping statutes, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), negligent supervision, respondeat superior liability, breach of fiduciary duty and constructive fraud, and unfair and deceptive trade practices.[22] Noticeably missing from the list of grievances was libel.

Food Lion won on the claims of trespass, fraud, and breach of fiduciary duty and proved $1,402 in actual damages.[23] Because Food Lion failed to allege and subsequently prove actual malice, the standard necessary to prove defamation under *New York Times v. Sullivan*,[24] Food Lion was not able to recover for damages to its reputation—including lost profits and securities value.[25] Despite the fact that Food Lion proved only $1,402 in actual damages and that the material contained in the news story was presumed to be true under the law,[26] the jury awarded Food Lion more than 5.5

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18. *See id.; see also* Scott Andron, *Food Lion Roaring Back*, GREENSBORO NEWS & RECORD, Feb. 16, 1997, at E1, *avialable in* 1997 WL 4572293 (discussing Food Lion's losses following the broadcast and Food Lion's recent economic comeback).

19. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 816 (M.D.N.C. 1995).

20. *See* Andron, *supra* note 18.

21. *See Food Lion*, 887 F. Supp. at 812-13. Food Lion named as defendants: Capital Cities/ABC, Inc., ABC Holding Co., Lynne Lit, Richard N. Kaplan, Ira Rosen, and Susan Barnett. Richard N. Kaplan was PrimeTime Live's executive producer, and Ira Rosen was PrimeTime Live's senior producer during the time relevant to the case. *See id.* at 813.

22. *See id.*

23. *See* Scott Huler, *Food Lion Awarded Punitive Damages*, THE NEWS & OBSERVER-RALEIGH, NC., Jan. 23, 1997, at A1.

24. 376 U.S. 254 (1964); *see also infra* text accompanying notes 49-51 (discussing "actual malice" requirement).

25. *See Food Lion*, 887 F. Supp. at 823 (following United States Supreme Court's analysis in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)).

26. *See Sullivan*, 376 U.S. at 262 (placing the burden of proving falsity on the plaintiff).

million dollars in punitive damages.[27] A federal court later remitted the punitive damages to $315,000.[28]

This Article examines the problem of applying punitive damages to newsgathering torts from a constitutional perspective.[29] The Article provides a brief overview of the conflict between tort liability and the freedom of the press, followed by a discussion of the constitutional concerns raised by punitive damage awards. This Article then explores the unique problems incurred by awarding punitive damages for newsgathering torts. Finally, this Article argues that punitive damages unjustifiably burden the free exercise of the press when applied to newsgathering torts.

## II. General Principles

> "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[30]

In order to protect the "vigorous and uninhibited" exercise of the press, the United States Supreme Court has limited damages that a plaintiff may recover for injuries caused by the publication of truthful material.[31] General tort law principles provide causes of action for defamation[32], publication of private facts[33], and publication of injurious falsehood.[34] However, when these or

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27. *See* Huler, *supra* note 23.

28. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 940 (M.D.N.C. 1997).

29. While this article will address the general conflict between tort principles and freedom of the press, the arguments within this paper focus specifically on the issue of punitive damages. For a thorough overview of newsgathering tort liability, see Symposium, *Undercover Newsgathering Techniques: Issues and Concerns*, 4 WM. & MARY BILL RTS. J. 1111 (1996)

30. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

31. *See, e.g., id.*; New York Times v. Sullivan, 376 U.S. 254 (1964).

32. *See* BLACK'S LAW DICTIONARY 417 (6th ed. 1990) (defining defamation, in pertinent part, as "[a]n intentional false communication, either published or publicly spoken, that injures another's reputation or good name.").

33. *See id.* 1195 (defining "public disclosure of private facts" as one of four general classes of tort actions for invasion of privacy "consisting of a cause of action in publicity, of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation.").

34. Publication of injurious falsehood is defined as:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he

similar tort actions are brought against the press, tort principles must be balanced against the First Amendment rights of free speech and freedom of the press.[35]

### *A. Publication*

In *New York Times Co. v. Sullivan*[36] the United States Supreme Court held that the First Amendment limits the liability that a state may impose upon a publisher for statements regarding public officials.[37] In 1960, the *New York Times* published a political advertisement accusing unnamed government officials in Montgomery, Alabama of using violence and intimidation to suppress the civil rights movement.[38] L.B. Sullivan, the Montgomery Commissioner who supervised the police department, sued the *New York Times* for libel, alleging that the publication referred to him, and defamed him.[39]

Under Alabama law, any publication that "'tend[ed] to injure a person . . . in his reputation,' or to 'bring [him] into public contempt'" was considered "libelous per se."[40] Therefore, Sullivan only had to prove that the statements were published by the defendant, and were made "of and concerning" Sullivan.[41] The defendant could avoid liability by proving the truth of the published statements; however, if the defendant did not prove the statements' truth, damages were presumed and could be awarded without out proof of actual injury.[42]

The United States Supreme Court held that the Alabama libel law violated the Free Speech and Press Clauses of the First Amendment.[43] The *Sullivan* Court feared the potential chilling

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knows that the statement is false or acts in reckless disregard of its truth or falsity. RESTATEMENT (SECOND) OF TORTS § 623A (1979).

35. *See Gertz*, 418 U.S. at 343.

36. 376 U.S. 254 (1964).

37. *See id.* at 264 (holding that First and Fourteenth Amendments require "safeguards for freedom of speech and of the press . . . in a libel action brought by a public official against critics of his official conduct.").

38. *See id.* at 256.

39. *See id.*

40. *Id.* at 267.

41. *See Sullivan*, 376 U.S. at 267.

42. *See id.*

43. *See id.* at 279 (holding the law violated the First Amendment, as applied to the states through the Fourteenth Amendment).

effect[44] imposed by any law that placed the burden of proving the truth of an allegedly libelous statement on the publisher.[45] The *Sullivan* Court recognized that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'[46] Requiring a publisher to prove the truth of its statements imposed too high a burden on a publisher, and would lead to unacceptable self-censorship by the media.[47]

Because First Amendment protection of political criticism is a "fundamental principle of our constitutional system,"[48] the *Sullivan* Court formulated a rule designed to encourage "uninhibited, robust, and wide-open" debate on public issues.[49] The Court held that a public official seeking damages for a statement made about his or her public acts must pass a stringent two-part test to prove libel.[50] First, the public official must show that the statement was false.[51] Second, the public official must prove that the publisher acted with actual malice, meaning that the publisher acted "with knowledge that [the statement] was false or with reckless

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44. *See* BLACK'S LAW DICTIONARY 240 (6th ed. 1990) (defining "chilling effect" as "[t]he deterrent effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights. To constitute a chilling effect the constrictive impact must arise from the present or future exercise or threatened exercise of coercive power.").

45. *See Sullivan*, 376 U.S. at 271; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) ("In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise.") (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

46. *See Sullivan*, 376 U.S. at 271-72. The court went on to state that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *Id.* at 279.

47. *See id.* at 278.

48. *Id.* at 269. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

49. *Id.* at 270.

50. *Id.* at 279-80; *see also Gertz* at 340-41 (reaffirming principle that although "neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues," lies or errors are "nevertheless inevitable in free debate.") (citations omitted).

51. *See Sullivan*, 376 U.S. at 279-80.

disregard of whether it was false or not."[52] This two-part test is commonly known as the "*Sullivan* test."

By contrast, if a private individual[53] sues for libel, the First Amendment requires a lesser showing of proof than would be required from a public official. In *Gertz v. Robert Welch, Inc.*,[54] the United States Supreme Court concluded that the state interest in compensating a private individual for unjustified reputational damage weighs against First Amendment interests that apply in matters concerning public officials.[55] This state interest is limited only by the fact that the First Amendment prohibits any state from imposing liability without fault.[56] In other words, a state may impose damages for libel of a private individual without requiring that the plaintiff prove actual malice; a lesser negligence or recklessness standard suffices.[57]

However, the *Gertz* Court strictly limited the damages available to private citizens who prevail under a standard less stringent than the *Sullivan* test.[58] Whereas under traditional libel law, a plaintiff could recover presumed[59] and punitive damages,[60] the *Gertz* Court explicitly prohibited both of these forms of

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52. *Id.* at 280.

53. Private individual in this sense means any person that is neither a public official acting in an official capacity nor a public figure as defined by *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court in *Butts* expanded the *Sullivan* test to apply to statements regarding public figures. *See id.* at 155. *Butts* defines "public figure" as a person who is of general public interest because of their status or position, or a person who has thrust himself "into the 'vortex' of an important public controversy." *Id.* at 155. For the purposes of this paper, no analytical distinctions are made between "public figures" and "public officials."

54. 418 U.S. 323 (1974).

55. *See id.* at 341 ("The need to avoid self-censorship by the news media . . . is not the only societal value at issue . . . . The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted upon them by defamatory falsehood.").

56. *See id.* at 347 (holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

57. *See id.* This holding ended the common law practice of applying strict liability for defamation and required at least proof of negligence in regard to falsity in order to find liability. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt d. (1979); *see also Gertz*, 418 U.S. at 340 ("Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

58. *See Gertz*, 418 U.S. at 349.

59. Under traditional libel law, injuries were presumed to flow from the publication of a false statement. *See id.* at 349. Thus, presumed damages could be awarded even where the plaintiff offered no proof of actual injury. *See id.*

60. *See id.*; *see also infra* note 162 and accompanying text.

damages.[61] Instead, the *Gertz* Court determined that, in those cases in which actual malice is not established, awarding libel damages above the amount of actual injury would significantly impair First Amendment freedoms.[62] "The largely uncontrolled discretion of juries to award damages where there is no [actual] loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."[63] Furthermore, the Court held that states have "no substantial interest" in awarding plaintiffs damages in excess of actual injury.[64] Therefore, a private individual who establishes libel without proving actual malice can only recover actual damages.[65]

### *B. Newsgathering*

Unlike publication, newsgathering does not have well-defined standards of protection under the First Amendment. Despite the Supreme Court's lofty assertions of newsgathering's constitutional status,[66] the Court has hesitated to extend the freedom of the press to protect newsgathering.[67] The Court has instead drawn a hazy line between the publication and the gathering of the news.[68]

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61. *See Gertz*, 418 U.S. at 349.

62. *See id.*

63. *Id.*

64. *Id.*

65. *See id.* at 328. ("[We recognize] the strong and legitimate state interest in compensating private individuals for injury to reputation .... But this countervailing [against the First Amendment] state interest extends no further than compensation for actual injury.").

66. *See supra* note 2 and accompanying text.

67. Although the Court has recognized a First Amendment interest in newsgathering, this First Amendment interest has paled in comparison to the countervailing state interest involved in those cases in which newsgathering has conflicted with general tort principles. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Branzburg v. Hayes, 402 U.S. 665 (1972); *cf.* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 American Bar Foundation Research Journal 521, 592 (1977) ("Mr. Justice White's majority opinion [in *Branzburg*] acknowledged that the act of newsgathering is 'not without its First Amendment protection,' but the Court rejected all of the privilege claims presented .... and appeared to accord no more than intermediate importance to the First Amendment interests at issue." (footnote omitted)). Blasi argues that recognition of the "watchdog function" that the press serves over public officials might lead to heightened protection for newsgathering activities. *See id.* at 591-611. Blasi, however, would not exempt newsgathering functions from generally applicable laws. *See id.* at 611. *But see* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (granting press right to attend criminal trial).

68. *See supra* notes 81-84 and accompanying text.

The United States Supreme Court first examined whether newsgathering warrants constitutional protection in *Branzburg v. Hayes*.[69] In *Branzburg*, the Court questioned whether the First Amendment grants reporters a limited privilege not to reveal sources of information before a grand jury.[70] Despite the *Branzburg* Court's reassurance that "it [is not] suggested that newsgathering does not qualify for First Amendment protection"; the United States Supreme Court denied the privilege.[71] The Court dismissed the proposition that forcing reporters to reveal sources to grand juries would undermine reporters' ability to gain confidential information.[72] Instead, the Court held that the state interest in fair and effective law enforcement outweighed whatever burden the inability to keep confidential information might have on the press.[73]

Similarly, in *Cohen v. Cowles Media Co.*,[74] the Court held that generally applicable laws—laws that apply to all citizens and do not single out the press—do not violate the First Amendment when a law's enforcement has only an incidental effect on the press's ability to gather and report the news.[75] In *Cohen*, a confidential informant sued a newspaper on a promissory estoppel theory after the paper violated a confidentiality agreement and published the informant's name.[76] The newspaper argued that the First Amendment barred the lawsuit under the theory that a state may not punish the publication of lawfully obtained information without showing a state interest "of the highest order."[77] The United States Supreme Court rejected this argument.[78] The Court held that the controlling issue in the case was not whether the state could punish the publication, but whether the defendants would be

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69. 408 U.S. 665 (1972).

70. *See id.* at 667.

71. *Id.* at 681.

72. *See id.* at 682-88; *see also* Blasi, *supra* note 67, at 592 ("The Court's failure in *Branzburg* to give more weight to the newsgathering interest can be ascribed in part to skepticism over whether a testimonial privilege would have much affect on the newsgathering capabilities of journalists.") (footnote omitted).

73. *Branzburg*, 408 U.S. at 690 (holding that the state interest outweighed the "consequential, but uncertain, burden on news gathering" that would be cause by forcing reporters to reveal confidential sources to grand jury inquests).

74. 501 U.S. 663 (1992).

75. *See id.* at 672.

76. *See id.* at 666.

77. *Id.* at 668-69 (citing Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

78. *See id.* at 669.

exempt from contract or tort liability because their otherwise tortious actions occurred while newsgathering.[79]

The *Cohen* case exemplifies the distinction between the protections afforded to newsgathering and publication under current First Amendment jurisprudence. In *Cohen*, the Court did not refute the defendant's assertion that the publication warranted protection.[80] Instead, the Court recognized that the newsgathering activity, and not the publication itself, was the focus of the plaintiff's claim.[81] By failing to attribute to newsgathering the constitutional protection afforded to publication, the Court was able to cast aside the defendant's First Amendment interests. Thus, the *Cohen* Court augmented a long list of cases supporting the proposition that the media "has no special immunity from the application of general laws."[82]

In the principal case in which the Supreme Court established a form of newsgathering protection, the Court was unable to form a majority opinion supporting the theory behind that protection. In *Richmond Newspapers, Inc. v. Virginia*,[83] the Court held that, absent a showing that access to the trial would prejudice the defendant, the First Amendment guarantees the press[84] the right

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79. *See Cohen*, 501 U.S. at 670 (stating that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.") (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1946)).

80. *See id.* at 669.

81. *See id.*

82. *Id.* at 670 (quoting Associated Press v. NLRB, 301 U.S. at 132-33 (1946)). The decision in *Cohen* was consistent with prior Supreme Court precedent that the First Amendment does not prevent the application of generally applicable laws to newsgathering. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 581 (1983) (recognizing that newspapers can be subjected to "generally applicable economic regulations without creating constitutional problems."); Zacchini v. Schripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (holding that the press must respect copyright laws); Branzburg v. Hayes, 408 U.S. 665, 682 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (holding that the Fair Labor Standard Act applies to the business of publishing and distributing newspapers); Associated Press v. United States, 326 U.S. 1 (1945) (holding that applying the Sherman Act to publishers does not abridge freedom of the press).

83. 448 U.S. 555 (1980).

84. *See id.* at 572-73. (The Court attributed to the press the function as the people's surrogate in this sense: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the electronic media. In a sense, this validates the media claim of functioning as

to attend criminal trials.[85] As Justice Steven's concurring opinion notes, *Richmond Newspapers* was the first case in which the Court "squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."[86]

Unfortunately, the establishment of explicit newsgathering protection failed to command a majority of the Court.[87] Chief Justice Burger, joined by Justices White and Stevens, delivered an opinion noting that *Branzburg* had promised protection for newsgathering.[88] The opinion did not, however, commit this protection to cover the present issue. Instead, the Chief Justice determined only that the right to observe a criminal trial was guaranteed by the First Amendment, while explicitly declining to decide whether this right should fall under the category of a "right of access,"[89] or a newsgathering privilege.[90]

Justice Brennan, joined by Justice Marshall, concurred in an opinion that draws less of a distinction between rights-of-access and newsgathering privileges. In fact, the opinion seems to merge the two issues, almost including a newsgathering privilege within a right of access: "The Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information."[91] Thus, *Richmond Newspapers*, while protecting newsgathering on First Amendment grounds, fails again to define where newsgathering belongs within First Amendment jurisprudence.

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surrogates for the public.").

85. *See id.* at 581.

86. *Id.* at 582 (Stevens, J., concurring).

87. Chief Justice Burger wrote an opinion joined by Justices White and Stevens. *See id.* at 558-81. Justice White and Justice Stevens each issued concurring opinions. *See id.* at 581-84. Justice Brennan issued an opinion concurring in the judgment, in which Justice Marshall joined. *See id.* at 584-98. Justice Stewart and Justice Blackmun each issued concurring opinions. *See id.* at 598-604. Justice Rhenquist dissented. *See id.* at 604-06. Justice Powell did not participate in the case.

88. *See Richmond Newspapers*, 448 U.S. at 576.

89. *See id.* at 575-76 ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") (quoting First National Bank of Boston v. Belloti, 435 U.S. 765, 783 (1978)).

90. *See id.* at 576 ("It is not crucial whether we describe this right . . . as a 'right of access' . . . or a 'right to gather information,' for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated.") (citations omitted).

91. *Id.* at 586 (Brennan, J., concurring).

*Branzburg, Cohen*, and *Richmond Newspapers* reveal an ambiguity in United States Supreme Court jurisprudence about the status of newsgathering under the First Amendment. The Court has stated that newsgathering warrants First Amendment protection; yet the Court has repeatedly hesitated to extend this protection to shield the press from generally applicable laws. While *Richmond Newspapers* protects newsgathering activity, the case fails to provide a theoretical framework in which to place newsgathering under the First Amendment.

## III. Newsgathering, Torts, and the First Amendment

> "A free press cannot be made to rely solely upon the sufferance of government to supply it with information."[92]

### *A. A "Glorious History"*

Undercover newsgathering techniques similar to those used in the *Food Lion* case have been used by the print media in the United States for over a century.[93] Similarly, the television media have been using undercover newsgathering techniques for almost thirty-five years.

In 1963, the television program CBS Reports used hidden cameras to expose a "bookie joint" in Boston.[94] PrimeTime Live, the defendants in the *Food Lion* case, has routinely used undercover newsgathering techniques since 1989.[95] Interestingly, PrimeTime Live's early investigative reports involved stories similar to those written by Nellie Bly and Upton Sinclair. In 1989, two ABC producers posed as mentally ill patients to uncover abuses in a board and care home in Texas; in 1992, ABC reporters posed as employees in a meat-packing plant to investigate unsanitary

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92. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979).

93. Famous examples include NEW YORK WORLD reporter Nellie Bly, who in 1877 posed as a mentally ill patient to uncover the horrors of a New York City insane asylum. *See* Alf Pratte, *Sometimes Subterfuge by Journalists Needed to Get Story*, THE SALT LAKE TRIBUNE, Feb. 23, 1997; *see also Nellie Bly: Daredevil, Reporter, Feminist*, PUBLISHERS WEEKLY, January 10, 1994 Vol. 241, No. 2., at 50 (Book Review), *available in* 1994 WL 1348336 (regarding Bly as a pioneer among women journalists). Upton Sinclair, who's 1906 book THE JUNGLE exposed substandard conditions in the meat-packing industry, is another example. *See* Clarence Page, *Undercover Reporting on Food Lion: ABC Was Right*, THE RECORD, Feb. 3, 1997, at A15.

94. *See PrimeTime Live*, *supra* note 12.

95. *See id.* ("PrimeTime's trademark has been investigative reporting, and it will continue to be.").

conditions in the industry.[96] Additionally, PrimeTime Live reporters have used hidden cameras, false identities, and similar deceptive practices to unveil neglect in veterans hospitals, abuse in day care centers, medicare fraud, and improper activities by members of Congress.[97]

Public support for undercover newsgathering practices has changed over the years. In 1963, the CBS report entitled "Biography of a Bookie Joint" won critical acclaim.[98] However, as journalist Clarence Page notes, public support for undercover newsgathering practices began to fade in 1978, when a similar "sting" operation set up by the Chicago Sun-Times and 60 Minutes of CBS received public criticism, rather than commendation.[99] Today, public opinion is almost evenly divided on the issue. A national survey taken shortly after the *Food Lion* verdict reveals that about half of Americans who had heard of the case supported the undercover newsgathering techniques used by ABC.[100]

The *Food Lion* jury punished the use of deception by ABC in obtaining the story. Notably, the *Food Lion* jurors reached their $5.5 million verdict without considering the propriety of the use of hidden cameras.[101] Instead, the *Food Lion* jury focused on the fact that the reporters had lied about their identities and experiences in order to gain employment with *Food Lion*.[102] Some of the *Food Lion* jurors felt that this form of deceit transgressed the boundaries of ethical journalism. "It's like playing football," *Food*

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96. *See id.*

97. *See id.*

98. *Id.*

99. *See* Page, *supra* note 93, at A15 (discussing a tavern set up by the media which caught city inspectors inviting and accepting bribes).

100. *See* Scott Andron, *National Survey Says Americans Side with ABC, Not Food Lion*, GREENSBORO NEWS & RECORD, Feb. 17, 1997, at B4. This survey was conducted between January 28 and February 6, 1997. *See id.* Of the 1001 adults surveyed, 51% said that they had heard of the case and 52% of those who had heard of the case supported ABC. *See id.* 59% of all respondents thought that $5.5 million was "too severe" a penalty and 23% of respondents said that the verdict was "about right." *Id.* Seven percent said the verdict "wasn't enough." *Id.*

101. *See PrimeTime Live*, *supra* note 12. In fact, each of the *Food Lion* jurors told Diane Sawyer that they felt that the press may justifiably use hidden cameras in some situations. *See id.* Five members of the *Food Lion* jury felt that hidden cameras were justified in that case; three did not. *See id.*

102. *See id.*

*Lion* jury foreman Gregory Mack told Chris Salutto of the *Philadelphia Inquirer*, "there are boundaries."[103]

### *B. The Development of Newsgathering Torts*

The term, "newsgathering torts" refers generally to tort claims in which plaintiffs sue the press for damages incurred as a result of the newsgathering process.[104] Newsgathering tort claims often, but do not always, accompany claims for publication damages.[105] Additionally, newsgathering tort claims provide alternative theories by which targets of investigative reports can seek redress against the press without alleging libel.[106] Recurring claims include invasion of privacy,[107] trespass,[108] and interference with contractual relationship.[109]

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103. Chris Salutto, *Food Lion Jury Did a Good Job, printed in* GREENSBORO NEWS & RECORD, Feb. 3., 1997 at A9.

104. The most frequently cited newsgathering tort cases involve the publication of confidential information, *see, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989), Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), or prior restraint, *see, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971). These cases are distinguishable from the cases discussed in this section because the tort claims in these cases involve—at least in part—the content of the publication. Because this paper focuses on the tactical side of newsgathering torts, this section will avoid discussion of some of these more famous newsgathering cases.

105. *See, e.g.*, Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345, 1347 (7th Cir. 1995) ("The suit is for trespass, defamation, and other torts arising out of the production and broadcast of a program segment of PrimeTime Live that was highly critical of [the plaintiffs]."); *see also* James C. Goodale, *Outline For Tortious Interference*, 446 PLI/PAT 495, 497 (1996) (referring to use of interference with contract claims as an "add-on" to libel cases).

For discussion of general trends in newsgathering torts, *see generally* James C. Goodale, *Non-traditional Forms of Editorial Liability*, 447 PLI/PAT 451 (1996); Paul A. Lebel, *The Constitutional Interest in Getting the News: Toward A First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145 (1996).

106. *See* Jane Kirtley, *Vanity and Vexation: Shifting The Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069, 1078 (1996).

107. An invasion of privacy is: "The unwarranted appropriation or exploitation of one's personalty, publicizing one's private affairs with which public has no legitimate concern, or wrongful intrusion into one's private activities, in such a manner as to cause mental suffering, shame or humiliation to person of shorter sensibilities." BLACK'S LAW DICTIONARY 824 (6th ed. 1990).

108. Trespass is: "An unlawful interference with one's person, property, or rights. At common law, trespass was a form of action brought to recover damages for any injury to one's person or property or relationship with another. Any unauthorized intrusion or invasion of private premises or land of another." *Id.* at 1502.

109. "This tort has four elements: existence of a valid contract, defendant's knowledge of that contract, defendant's intentional procuring of breach of that contract and damages"

The rapidly increasing number of newsgathering tort claims has sparked a lively debate over how far—if at all—the First Amendment should protect the press from tort liability.[110] Newsgathering tort plaintiffs, as well as critics of First Amendment protection for newsgathering, contend that the freedom of the press does not give the media a "license to trespass,"[111] and cite the often quoted maxim that the press is not immune from general liability.[112] By contrast, proponents of First Amendment protection for newsgathering often cite investigative reporting's distinguished history as proof of newsgathering's value to the freedom of the press.

### C. *Unlimited Liability*

Because tort law is governed by the laws of the several states, newsgathering tort claims differ widely among jurisdictions. The varying elements of each individual tort claim make comparison of these cases difficult. The striking differences between newsgathering tort cases is apparent when Food Lion's $5.5 million jury award is compared with two other cases involving PrimeTime Live. These three cases involve similar issues, similar allegedly tortious actions, and the same defendants. The three verdicts were delivered within two years of one another. Yet because these cases were tried under tort law theories in different states, these cases produced very different results.

*Food Lion* involved two undercover reporters who posed as employees to obtain information for a news story.[113] While

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*Id.* at 814; *see also* Jennifier Falk Weiss, *Newsgathering Torts and Breach of Contract Claims*, 446 PLI/PAT 485 (1996).

110. *See, e.g.*, *PrimeTime Live*, *supra* note 12; Lebel, *supra* note 105; Robert M. O'Neil, *Tainted Sources: First Amendment Rights and Journalistic Wrongs*, 4 WM. & MARY BILL RTS. J. 1005 (1996); John J. Walsh, et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for the Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996); Lori Keeton, *Note: What is Really Rotten in the Food Lion Case, Chilling the Media's Newsgathering Techniques*, 40 FLA. L. REV. III (1997); *Punitive Award In Food Lion Case Puts Chill on Press Freedom*, BROWARD DAILY BUSINESS REVIEW, at A2.

111. Dietemann v. Time, Inc. 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of Another's home or office.")

112. *See id.*

113. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 816 (M.D.N.C. 1995).

employed by Food Lion, the reporters used hidden cameras and audio recording devices to gather news.[114] The jury found the reporters were guilty of fraud, trespass, and breach of loyalty under North Carolina law.[115]

By contrast, ABC was not liable of either trespass or fraud after it was sued on similar facts in Illinois. In *Desnick v. ABC*,[116] ABC sent undercover reporters, disguised as patients, to investigate an optometrist reputed for unethical practices.[117] Desnick sued ABC for trespass,[118] fraud,[119] invasion of privacy,[120] and violation of wire tapping statutes.[121] Each of these claims failed under state tort law.[122]

The *Desnick* Court criticized the plaintiffs' fraud claim.[123] The plaintiffs alleged that ABC had committed fraud by agreeing to interview Desnick without sending any undercover reporters into Desnick's office.[124] Instead, ABC sent undercover reporters into offices affiliated with Desnick in other states.[125] Writing for the United States Court of Appeals for the Seventh Circuit, Chief Judge Richard Posner stated:

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114. *See id.*

115. *See id.*

116. 44 F.3d 1345 (7th Cir. 1995).

117. *See id.* at 1348.

118. *See id.* at 1351 (Under Illinois law, trespass is "[t]o enter upon another's land without consent").

119. *See id.* at 1354 (noting that the plaintiffs alleged that ABC committed fraud by gaining access to the plaintiffs's office by falsely promising that they would present a fair picture of the Center's operations and would not use undercover tactics). The trial court had sustained the plaintiffs' breach of contract claim on these grounds, but the plaintiffs voluntarily dismissed that claim in order to appeal the trial court's dismissal of the other claims. *See id.*

120. *See supra* note 107 and accompanying text.

121. *See Desnick*, 44 F.3d at 1353 (noting plaintiffs' allegation that ABC violated both federal and Wisconsin statutes regulating electronic surveillance).

122. *See id.* at 1351-54. In addressing the plaintiffs' claim of trespass, the court rejected the argument that the fraud by the defendants in gaining access negated the plaintiffs' consent. *See id.* at 1351. The court also rejected the claim of invasion of privacy, ruling that "no intimate personal facts concerning the two individual plaintiffs . . . were revealed." *Id.* at 1353. The court rejected the plaintiffs claim that by recording the conversations ABC violated federal and state wiretapping statutes because the plaintiff could not show that the purpose of the recording was to commit a crime, tort, or other "injurious acts." *See id.* Finally, the court rejected the fraud claim because the plaintiffs could not show that the false promises were part of a "scheme" to defraud. *See id.* at 1354.

123. *See id.* at 1354-55.

124. *See id.* at 1354.

125. *See id.*

> Investigative journalists well known for ruthlesness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods . . . . No legal remedies to protect [*Desnick*] from what happened are required, or by Illinois law provided.[126]

Recently, ABC likewise prevailed in an invasion of privacy suite in California. In *Sanders v. ABC*,[127] a California appellate court reversed a $1.2 million judgement awarded to the director of a tele-psychic business.[128] Like *Food Lion* and *Desnick*, *Sanders* involved an undercover reporter using a false identity to gather news.[129] The reporter posed as an employee of a tele-psychic business in order to obtain hidden video camera footage for a PrimeTime Live story.[130] The *Sanders* court held that ABC was not liable for invasion of privacy because the jury found that the plaintiff had no reasonable expectation of privacy, an essential element of an invasion of privacy claim.[131]

The *Sanders, Desnick*, and *Food Lion* cases share some similarities as well as differences. One common factor between these cases is the courts' inability to define the proper place for newsgathering under the First Amendment.[132] Even when the press has defeated liability for newsgathering, courts have shown reluctance to offer First Amendment grounds for their decisions. The trial court in the *Desnick* case, for example, did not even address the freedom of the press issue.[133] Judge Posner's *Desnick* opinion addresses the First Amendment, but only after each claim had been dismissed on tort grounds.[134]

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126. *Desnick*, 44 F.3d at 1354.

127. 60 Cal. Rptr. 2d 595 (Cal. Ct. App. 1997).

128. *See id.* at 596.

129. *See id.*

130. *See id.*

131. *See id.* The *Sanders* court held that a plaintiff alleging invasion of privacy under California law must establish three things: "(1) a legally protected privacy interest; (2) *a reasonable expectation of privacy under the circumstances*; and (3) conduct by defendant constituting a serious invasion of privacy." *Id.* (emphasis in original).

132. *See* Walsh et al., *supra* note 110, at 1123-24 (noting that courts are split over whether to balance First Amendment interest against newsgathering trespass claims, but that most courts reject First Amendment considerations).

133. Desnick v. ABC, 851 F. Supp. 303 (N.D. Ill. 1994).

134. Desnick v. ABC, 44 F.3d 1345, 1355 (7th Cir. 1995).

Similarly, the *Sanders* Court recognized the lawsuit's potential First Amendment implications,[135] but did not address the issue because it resolved the case entirely on tort grounds. Furthermore, the *Sanders* majority indicated that it might have found liability if the plaintiff had presented a trespass or fraud claim to the jury;[136] this statement indicates that the First Amendment would not have shielded the press from liability had the proper tort theory been raised. Thus, although the *Sanders* decision has been hailed as a vindication of ABC's undercover reporting style,[137] the decision fails to add any substance to newsgathering protection under the First Amendment.

The differences between the *Desnick, Sanders*, and *Food Lion* verdicts demonstrate the problem created by a lack of uniform limits for newsgathering tort liability. The facts of each case are substantially the same; yet, because tort law varies between states, these three cases yielded three different results.

The discrepancies among these cases could be resolved by a broader understanding of the importance of newsgathering under the First Amendment. Unfortunately, courts remain uncertain of where to place newsgathering within a constitutional scheme. To reconcile the conflict between the freedom of the press and tort liability, courts must move beyond vague statements acknowledging the importance of a free press,[138] and establish outer limits for newsgathering liability upon which both the media and the general public can rely.

### *D. Circumventing* Sullivan

Newsgathering tort cases substitute for libel actions when a plaintiff cannot establish the proof required by the *Sullivan*

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135. *Sanders*, 60 Cal. Rptr. 2d at 597 ("[W]e note the case implicates First Amendment freedom of the press issues, resolution of which requires care lest we improperly restrict press freedom.") (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1965)).

136. *See id.* at 598 ("[W]e decline to extend tort protection under an invasion of privacy, as opposed to a trespass or fraud, cause of action, to those secretly photographed who lack an objectively reasonable expectation of privacy. . . .").

137. *See* John Carmody, WASHINGTON POST, *'PrimeTime' Takes On Hidden-Camera Issue*, Feb. 5, 1997, at C5 ("ABC News President Roone Arledge said Monday that the new ruling 'is a vindication of our belief that hidden cameras and undercover reporting can be important and legal tools of investigative journalism.'").

138. *See, e.g., Desnick*, 44 F.3d at 1355; *Sanders*, 60 Cal. Rptr. 2d at 597.

test.[139] Both proponents and critics of newsgathering tort liability have noted that newsgathering torts do in fact, and are often intended to, serve this function.[140] Proponents of newsgathering tort liability argue that this is a method by which to regulate media conduct.[141] Ironically, critics of newsgathering tort liability agree: Newsgathering torts substitute for libel claims when a plaintiff fails to meet the *Sullivan* test, and are therefore unconstitutional under the United States Supreme Court's analysis in *Hustler Magazine, Inc. v. Falwell.*[142]

In *Falwell*, the Court held that a public figure cannot recover for reputation damages caused by a lawful publication without proving libel.[143] In that case, the Reverend Jerry Falwell[144] sued Hustler Magazine for libel, invasion of privacy, and intentional infliction of emotional distress after the magazine featured a satirical interview that depicted Falwell describing an incestuous affair with his mother.[145] Falwell failed to prove invasion of privacy or libel at trial, but prevailed on the emotional distress claim.[146] The United States Supreme Court held that Falwell could not recover for emotional distress damages caused by the publication which he failed to prove was libelous.[147]

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139. *See* George Freeman et al., *'60 Minutes' and the Law "Can Journalists Be Liable for Tortious Interference With Contract?*, 68-AUG N.Y. St. B.J. 24, 28 (1997). The authors state:

> For most of this century, plaintiffs have sought to employ tort theories other than defamation in their efforts to halt, or to obtain redress for harm done to them by, press publication. Their obvious purpose has been to evade the common-law and constitutional hurdles that protect the press from actions for libel.

*Id.*

140. *See* Walsh et al., *supra* note 110, at 1133-34 (noting that the ninth circuit, in Dietemann v. Time, Inc. 449 F.2d 245 (9th Cir. 1971), based it's reinstatement of the trial court's damage award solely upon harm caused by publication); *but see*, Kirtley, *supra* note 106, at 1080 (noting that newsgathering tort claims have become a means for corporate plaintiffs to attack and discourage unfavorable news reporting).

141. *See* Walsh et al., *supra* note 110, at 1134-35 (suggesting that the media forfeit their First Amendment rights when they transgress civil or criminal laws in the course of newsgathering.

142. 485 U.S. 46 (1988).

143. *See id.* at 56.

144. Falwell is considered a public figure under the doctrine set forth in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) and was therefore held to the heightened standard of proof required by the *Sullivan* test. *See Falwell*, 485 U.S. at 51-52.

145. *See Falwell*, 485 U.S. at 47-48.

146. *See id.* at 49

147. *See id.* at 56.

The *Falwell* Court reaffirmed the value of "the free flow of ideas and opinions on matters of public importance,"[148] and recognized that political cartoons and satires are designed to contribute to public debate.[149] The Court noted that political cartoons and satires are sometimes caustic in nature, and often are intended to injure or embarrass their subjects.[150] Nonetheless, the Court noted that political cartoons and satires have historically "played a prominent role in public and political debate," and are therefore entitled to First Amendment protection.[151]

The *Falwell* Court recognized that the cause of Falwell's emotional distress was the lawful publication of the satire.[152] The Court, however, would not allow Falwell to recover damages for the lawful publication because he did not prove libel: "Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject."[153]

The *Falwell* holding signaled—at least in emotional distress cases—that the United States Supreme Court is not willing to let plaintiffs circumvent the *Sullivan* test merely by alleging a tort theory other than libel. In a later opinion, the Court reflected on *Falwell* as a case in which the plaintiff "[attempted] to use an emotional distress theory to avoid the strict requirements for establishing a libel or defamation claim."[154] In *Desnick*, Judge Posner comments upon the *Falwell* case and plaintiffs' attempts to substitute newsgathering tort claims for libel:

> Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market, . . . constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded

148. *Id.* at 50.
149. *See id.* at 54.
150. *See Falwell.* 485 U.S. at 54.
151. *Id.*
152. *See id.* at 55.
153. *Id.* at 53.
154. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) (Nor is [the plaintiff] attempting to use a[n alternative tort theory] to avoid the strict requirements for establishing a libel or defamation claim . . . . Thus, this is not a case like *Hustler Magazine* . . ., where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.").

> liability for defamation. And it is entitled to them regardless of the name of the tort, . . . , and we add, regardless of whether the aimed at the content of the broadcast or the production of the broadcast.[155]

Following the *Falwell* analysis, the *Food Lion* court attempted to prohibit those of Food Lion's claims that were based on publication damages.[156] Because Food Lion did not allege that the publication was libelous, the *Food Lion* court instructed the jury not to award damages for harm to Food Lion's reputation caused by the broadcast.[157] However, relying on *Cohen v. Cowels Media Co.*,[158] the *Food Lion* Court did not bar any of Food Lion's claims that were based on actual damages.[159]

The distinction between publication and actual damages apparently confused at least one of the *Food Lion* jurors.[160] Although ABC had only caused Food Lion $1402 in actual damages, the jury determined that the actions of ABC were wrongful enough to warrant a $5.5 million punitive damage award. At least one juror justified her verdict on the damages caused by the publication: "[ABC] hurt Food Lion. They lost money."[161] Thus, while protecting publication is an essential and well-established function of the First Amendment, publication can still be punished where newsgathering is subject to unlimited liability.

## IV. Punitive Damages and The Press

The Restatement (Second) of Torts defines punitive damages as "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[162] In *BMW of North America, Inc. v. Gore*,[163] the United States Supreme Court held that punitive damages serve a

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155. Desnick v. ABC, 44 F.3d 1345, 1355 (7th Cir. 1995) (citations omitted).

156. *See* Food Lion, Inc. v Capital Cities/ABC, Inc., 887 F. Supp. 811, 822 (N.D.N.C. 1995) (deciding that the case followed *Cohen* and that press was not immune from generally applicable law). *But see id.* (accepting ABC's argument that Food Lion could not recover for reputational damages under Supreme Court's analysis in *Falwell*).

157. *See id.* at 822.

158. 501 U.S. 663.

159. *See Food Lion*, 887 F. Supp. at 821.

160. *See PrimeTime Live*, *supra* note 12.

161. *Id.*

162. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

163. 517 U.S. 559 (1996).

legitimate state interest in punishing and deterring tortious conduct.[164] Other rationales supporting punitive damage awards have included vindicating hurt feelings, financing litigation costs in which small compensatory awards are expected, and satiating a plaintiff's desire for revenge.[165]

### *A. Unjustifiable Burden*

Punitive damages present special problems when applied to the press. In *Gertz v. Robert Welch, Inc.*,[166] the United States Supreme Court held that awarding punitive damages for libel when the plaintiff is not required to prove actual malice may impose an unjustifiable burden on the press.[167] While a state has a legitimate interest in deterring and punishing tortious conduct,[168] this interest must be balanced against the First Amendment where a plaintiff seeks recovery for damages caused by publication.[169] When a libel plaintiff does not establish actual malice, the First Amendment interests in freedom of speech and press override the state interest in punishing and deterring tortious conduct.[170]

The *Gertz* Court held that punitive damages may not be awarded to a private individual who establishes libel without proving actual malice.[171] The Court noted that punitive awards are unpredictable and often result in amounts bearing no reasonable relation to actual damages.[172] Furthermore, allowing a jury to award punitive damages for libel would give the jury a tool by which to punish unpopular views.[173]

Finally, the *Gertz* Court found no legitimate state interest in awarding punitive damages in a libel action when the plaintiff does

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164. *See id.* at 568.

165. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2nd Cir. 1967).

166. 418 U.S. 323 (1974).

167. *See id.* at 349-50.

168. *See BMW*, 517 U.S. at 568.

169. *See Gertz*, 418 U.S. at 349. ("We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment.").

170. *See id.* at 349.

171. *See id.* at 350.

172. *See id.* at 350 ("In most jurisdictions, jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

173. *See id.* ("[Juries] remain free to use their discretion selectively to punish expressions of unpopular views.").

not prove actual malice.[174] The Court held that punitive damages are "wholly irrelevant" to the state interest justifying the exception to the *Sullivan* test in a libel suit by a private individual—compensating a private individual for unjustified reputational injury.[175] The Court noted that punitive damages "are not compensation for injury. Instead, they are private fines levied by civil jurors to punish reprehensible conduct and deter its future occurrence."[176] For these reasons, the Court determined that allowing juries to award punitive damages in these cases "unnecessarily exacerbates the danger of media self-censorship."[177]

In his dissenting opinion in *Rosenbloom v. Metromedia, Inc.*,[178] Justice Thurgood Marshall argued that punitive damages unjustifiably magnify the threat of media self-censorship and should be forbidden in all libel cases.[179] Justice Marshall argued that a fear of a potential punitive damage award would dampen a publisher's incentive to seek out news and therefore constrain the vigorous exercise of the press.[180] Like the *Gertz* majority, Justice Marshall argued that a jury's unlimited discretion would allow a jury to sanction unorthodoxy.[181] Furthermore, punitive damages remove all reasonable predictors of potential liability.[182] Fear of such arbitrary and unpredictable damage awards, Justice Marshall argued, would directly and fundamentally threaten the free exercise of the press.[183]

### *B. Constitutional Implications of Punitive Damages*

In *BMW of North America, Inc. v. Gore*,[184] the United States Supreme Court held that, because punitive damages awards are disciplinary in nature, punitive damages awards must comport with

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174. *See Gertz*, 418 U.S. at 350.

175. *Id.* ("[P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.").

176. *Id.*

177. *Id.*

178. 403 U.S. 29 (1971) (Marshall, J., dissenting).

179. *See id.* at 84.

180. *See id.* at 81.

181. *See id.* (differing with the Gertz majority, however, in that the *Gertz* holding would apparently allow punitive damages in cases in which malice is proven; Justice Marshall's opinion would not.)

182. *See id.*

183. *See Rosenbloom*, 403 U.S. at 81.

184. 517 U.S. 559 (1996).

constitutional standards.[185] The *BMW* Court recognized that most states give juries a significant amount of latitude in determining punitive damages awards.[186] However, the Court held that where punitive damages awards are "grossly excessive," in relation to a state's interest in punishing and deterring wrongful conduct, they "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[187]

The Due Process Clause of the federal constitution entitles a defendant to receive fair notice that his conduct may subject him to punishment as well as notice of potential severity of that punishment.[188] Because juries have virtually unlimited discretion in awarding punitive damages awards, these awards run the risk of violating this fair notice requirement.[189] Therefore, the state interest in applying punitive damages awards must be balanced against factors indicating whether the defendant had sufficient notice of the potential sanction that its conduct might attract.[190] Punitive damages awards which are "grossly excessive" in relation to the state interest in applying the award violate a defendant's Due Process right to fair notice of the potential sanction imposed upon him.[191]

### *C. Competing Interests*

The Court's analysis in *BMW* of whether an award is "grossly excessive" lends greater insight to the propriety of awarding punitive damages in the newsgathering context. To determine whether a punitive damage award was "grossly excessive," the Court first examined the state interest involved in enforcing the punitive damage award.[192] Punitive damages awards, like criminal sanctions,[193] serve the state interest of punishing and deterring wrongful conduct.[194] This state interest must then be balanced

185. *See id.* at 568.

186. *See id.*

187. *Id.*; *see also* U.S CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

188. *See BMW*, 517 U.S. at 574.

189. *See id.* at 575.

190. *See id.* at 574-75.

191. *Id.* at 568.

192. *See id.* at 568-74.

193. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 81 (1971) (Marshall, J., dissenting.)

194. *See BMW*, 517 U.S. at 568.

against factors indicating whether the defendant had sufficient notice of the penalty that his actions might attract.[195] These factors are: the degree of reprehensibility of the defendant's conduct,[196] the ratio of the punitive award to the amount of compensatory damages established[197] and criminal or civil sanctions that could lawfully be imposed for similar misconduct.[198]

The first factor indicating whether a defendant had notice of the potential punitive damages award that may be imposed upon him is the "degree of reprehensibility" of the defendant's conduct.[199] In determining the degree of reprehensibility of an offense, a jury may consider both the severity of the act and the defendant's motive.[200] Punitive damages awards are generally awarded for wrongful actions that are considered "outrageous"[201] or "egregiously improper."[202] As the *BMW* Court noted, these factors reflect the principle that "some wrongs are more wrong than others."[203]

The degree of reprehensibility of newsgathering torts will generally be very low. "In any foreseeable media case [the actor's] motive presumably is to inform the public."[204] As the United States Supreme Court has recognized, the media serves as the "surrogate of the people" in gaining access to otherwise unaccessible information.[205] Thus, the media serves the important public function of "informing the public about the behavior of others, in affecting the conduct of public officials, and in deterring wrongful conduct by both public officials and private figures."[206] Judge Posner adopted this view in the *Desnick* case when he dismissed

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195. *See id.* at 574.

196. *See id.* at 575.

197. *See id.* The court noted that "exemplary damages must bear a 'reasonable relationship' to compensatory damages . . . ." *Id.* at 580.

198. *See id.*

199. *BMW*, 517 U.S. at 575.

200. *See id.* ("Thus we have said that 'nonviolent crimes are less serious than crimes marked by violence or threat of violence." and "'trickery and deceit' . . . are more reprehensible than negligence.") (citations omitted).

201. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the right of others.")

202. *BMW*, 517 U.S. at 580.

203. *Id.* at 575.

204. Freeman, et al., *supra* note 139, at 25.

205. *See supra* note 86.

206. Lebel, *supra* note 105, at 1153.

the claim that ABC reporters had acted with a 'fraudulent scheme' when the reporters disguised themselves as patients in order to uncover Desnick's unethical medical practices.[207] Judge Posner noted that "[t]he only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme."[208]

The second factor that determines whether a punitive damages award is "grossly excessive" is the ratio of the award to the amount of actual damages that the defendant's actions caused or could likely have caused to the plaintiff.[209] In *BMW*, the United States Supreme Court invalidated a punitive damages award that was 500 times the amount of actual damages suffered by the plaintiff.[210] Although the Court refused to establish a mathematical formula to determine the constitutional limits of punitive damages awards in relation to actual damages, the Court pointed out that punitive damages awards of four to ten times the amount of actual damages had bordered on the limits of constitutionally accepted awards in past cases.[211] The court concluded that "[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'"[212]

When newsgathering torts are used as a substitute for libel actions, punitive damages awards will often "raise a suspicious judicial eyebrow." This will be the case because damages for newsgathering torts are often only nominal. In the *Food Lion* case, for example, the ratio of the punitive damages award to the actual damages established at trial was over 3300 to 1.[213] Even after the remittitur of damages, the ratio of punitive to actual damages remains at 250 to 1.[214]

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207. *See* Desnick v. ABC, 44 F.3d 1345, 1355 (7th Cir. 1995).

208. *Id.*

209. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996).

210. *See id.* at 582.

211. *See id.* at 581.

212. *Id.* at 583 (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 481 (O'Connor, J., dissenting)).

213.

214. Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 937-40 (M.D.N.C. 1997).

Finally, the *BMW* court looked to whether criminal or civil sanctions could be imposed for similar conduct.[215] This point weighs neither for nor against the press, but instead brings us back to the need for uniform limits of newsgathering liability. As the *Desnick*, *Sanders*, and *Food Lion* cases show, the same newsgathering practices that resulted in defense verdicts in Illinois and California subjected ABC to a $5.5 million judgement in North Carolina.[216]

States have a legitimate interest in punishing and deterring tortious conduct.[217] However, when a state interest interferes with a constitutionally protected right, the state interest must be balanced against that right. In *Gertz* for example, the United States Supreme Court held that the state's legitimate interest in compensating a private individual for defamation must be balanced against the "constitutional command of the First Amendment."[218] Thus, although a state has a legitimate interest in punishing and deterring wrongful conduct, this interest must not extend so far as to impose an unjustifiable burden on the press.[219]

## V. Conclusion

> "The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right."[220]

Justice Marshall concluded his *Rosenbloom* dissent by proposing that the threat to the free press posed by punitive damages can be eliminated by restricting recovery in libel cases to compensatory damages.[221] This limitation on damages would serve the same underlying interest that exists in awarding punitive damages, that is, protecting individuals from defamation, while

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215. *See BMW*, 517 U.S. at 583-85.

216. *Compare* Food Lion, Inc. v. Capital Cities/ABC, 887 F. Supp. 811, *and* Lebel, *supra* note 105, *with* Desnick 44 F.3d 1345 (7th Cir. 1995), *and* Sanders v. ABC, 60 Cal. Rptr. 2d 595 (Cal. Ct. App. 1997).

217. *See BMW*, 517 U.S. at 568.

218. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1973).

219. *See id.*

220. Curtis Publishing Co. v. Butts, 388 U.S. 130, 148 (1967).

221. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 81 (1971) (Marshall, J., dissenting).

eliminating the risk of media self-censorship. Justice Marshall concluded, furthermore, that requiring a defendant to pay for actual damages would sufficiently serve the public interest in deterring future defamatory behavior.[222]

Actual damages for newsgathering liability serve a significant deterrent function. When a reporter knows that there is a risk of liability when pursuing a particular line of investigation, that reporter will be forced to make a careful determination of whether the cost is worth the benefit. Thus, it could not be said that the press is using the First Amendment as a license to "invade the rights and liberties of others."[223]

The national scope of today's media requires a more uniform —or at least predictable—standard for liability. The judiciary's failure to limit newsgathering liability under the First Amendment has resulted in unpredictable results in different jurisdictions. While media lawyers may seek assistance from practitioners guides to advise them of a particular jurisdiction's laws,[224] media lawyers have not been able to accurately predict newsgathering liability.[225]

Finally, states have little interest in applying punitive damages when the press incurs liability in the course of newsgathering. Punitive damages serve the state interest of punishing and deterring wrongful conduct. However, when liability is incurred in the course of newsgathering, and the press is serving the public function of disseminating information, this interest does not apply.

Twenty-five years after the Supreme Court reassured the media that "news gathering is not without its First Amendment protection,"[226] the Court has yet to define the constitutional status of newsgathering. Once newsgathering receives protection under the First Amendment, beyond the ephemeral language in previous United States Supreme Court opinions, a fair and adequate balancing test may be applied to determine when tort liability is appropriate for harm caused by newsgathering. Until then, the risk

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222. *See id.*

223. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991).

224. *See, e.g.*, James C. Goodale, *Non-Traditional Forms of Editorial Liability*, 447 PLI/Pat 451 (1996).

225. *See PrimeTime Live, supra* note 12 (noting that ABC's lawyers research the laws of each jurisdiction its reporters enter to "check for legality").

226. *Branzburg*, 408 U.S. at 707.

of media self-censorship will continue to grow as freedom of information is sacrificed to state interests in general tort liability.[227]

227. Judicial unwillingness to limit newsgathering liability has already had some discomforting chilling effects on the freedom of the press. In November 1995, CBS canceled a scheduled interview with a former employee of a tobacco company, Brown & Williamson, because it feared liability. *See* George Freeman et al., *supra* note 139, at 24; James C. Goodale, *'60 Minutes' V. CBS and Vice Versa*, 12/1/95 N.Y.L.J. 3 (col. 1) (1995). CBS was not concerned with any potential libel action; apparently, the network feared liability under an interference with contract tort theory. *See id.* Thus, the protections of the *Sullivan* test were of little help to the freedom of the press where CBS feared it would be sanctioned for newsgathering torts.